IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE THOTTATHIL B.RADHAKRISHNAN

TUESDAY, THE 24TH JULY 2007 / 2ND SRAVANA 1929

WP(C).No. 33428 of 2006(M)

PETITIONER:

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1. A. SREEKUMAR,
   ACHUTHAMANDIRAM, PADA-NORTH,
   KARUNAGAPPALLY, KOLLAM-690 518.

2. M.S. JAYESH,
   MALIKAYIL, S.L.PURAM P.O., CHERTHALA.

3. S. ABDUL KHADER KUNJU,
   ANANTHATHARA, NEERKUNNAM, VANDANAM P.O.,
   ALAPPUZHA-688 005.

4. GIRISH S.KUMAR,
   ASWATHY, ATTACHIRA, PALLICKAL P.O., KAYAMKULAM.

5. SUNITHA DEVI M.S.,
   MATHAYIKARA HOUSE, VADAVUKODE, PUTHENCRUZ.

6. BENZEER T.A.,
   THOPPIL VADAKKETHIL, S.R.P. MARKET P.O.,
   KARUNAGAPPALLY.

7. MANOJKUMAR T.R.,
   T.C.2/533, ASWATHY, PATTURAIKKAL, THRISSUR-1.

BY ADV. SMT.V.P.SEEMANDINI (SR.)
SRI.M.R.ANISON
SRI.M.S.UNNIKRISHNAN
SMT.S.KARTHIKA

RESPONDENTS:

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1. STATE OF KERALA,
   REP. BY CHIEF SECRETARY TO GOVT. OF KERALA,
   GOVT.SECRETARIATE, TRIVANDRUM.

2. THE SECRETARY TO GOVT. OF KERALA,
HOME DEPARTMENT, GOVT.SECRETARIATE, TRIVANDRUM.

3. THE LAW SECRETARY,
THE LAW (INSPECTION WING) DEPARTMENT,
GOVT.SECRETARIATE, TRIVANDRUM.

BY GOVT PLEADER SRI.T.B.HOOD

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 02/07/2007, ALONG WITH WPC NO.3994 OF 2007 AND WPC NO.33514 OF 2006 THE COURT ON 24/07/2007 DELIVERED THE FOLLOWING:

APPENDIX IN WPC.33428/06

PETIITONER'S EXHIBITS:

EXT.P1: TRUE COPY OF THE NOTIFICATION DATED 22.6.20006 ENCLOSING THE RELEVANT PAGES OF THE SELECT LIST.

EXT.P2: TRUE COPY OF THE RELEVANT PAGES OF AMENDMENT ACT, 2005.

EXT.P3: TRUE COPY OF THE RELEVANT PAGES OF RULE.

EXT.P4: TRUE COPY OF THE CONSOLIDATED LIST OF ALL THE 113 POSTS OF DGPS/PPS AND ADDL. P.P. AND ADDL.DGPS EXISTIG IN THE VARIOUS COURTS IN THE STATE.

EXT.P5(a): TRUE COPY OF THE G.O.(MS)N0.481/06/LAW DATED 3.11.2006.

EXT.P5(b):TRUE COPY OF THE G.O.(MS)N0.482/06/LAW DATED 3.11.2006.

EXT.P5(c): TRUE COPY OF THE G.O.(MS)N0.488/06/LAW DATED 9.11.2006.

EXT.P5(d): TRUE COPY OF THE G.O.(MS)N0.487/06/LAW DATED 10.11.2006.

EXT.P5(e): TRUE COPY OF THE G.O.(MS)N0.489/06/LAW DATED 10.11.2006.

EXT.P5(f): TRUE COPY OF THE G.O.(MS)N0.486/06/LAW DATED 10.11.2006.

/TRUE COPY/

THOTTATHIL B.RADHAKRISHNAN, J.

W.P(C).Nos.33514 & 33428 OF 2006
& 3994 OF 2007

Dated this the 24th day of July, 2007

JUDGMENT

Petitioners in the second among the captioned writ petitions are included in the select list for appointment as Assistant Public Prosecutor Grade -II, while the petitioners in the other writ petitions are Assistant Public Prosecutors Grade -I.

2. As per the Special Rules for the posts of Deputy Director of Prosecution and Senior Assistant Public Prosecutor, Assistant Public Prosecutor Grade-I and Assistant Public Prosecutor Grade-II, hereinafter referred to as the "Special Rules", issued by the Government of Kerala, invoking the power under Section 2(1) of the Kerala Public Services Act, 1968, hereinafter, the "Act", for short, Assistant Public Prosecutor Grade-II is the feeder category for promotion to the post of Assistant Public Prosecutor Grade-I, which, in turn, is the feeder category for promotion to the category of Deputy Director of Prosecution and Senior Assistant Public Prosecutor.

3. The case of the petitioners is that as per the amendment to Section 24 (6) of the Code of Criminal Procedure, 1973, hereinafter referred to as the "Code", by the Code of Criminal Procedure (Amendment) Act, 2005, hereinafter referred to as the "amending Act", a regular cadre of prosecuting officers has been created, which includes the post of Public Prosecutors as well as Additional Public Prosecutors. According to the petitioners, the post of Assistant Public Prosecutor, by the said amendment, could be feeder category for promotion to the post of Public Prosecutor and Additional Public Prosecutor. They contend that the Government have not made any appointment against those posts and that in terms of the aforesaid amendment to the Code, the Government are bound to fill all posts of Public Prosecutors as well as Additional Public Prosecutors by promoting and posting qualified persons from the category of Assistant Public Prosecutors. The petitioners allege that instead of doing the needful as contended by them, the Government are taking steps to fill up the posts of Public Prosecutors and Additional Public Prosecutors by recourse to Rule 8 of the Government Law

Officers (Appointment and Conditions of Service) and Conduct of Cases Rules, 1978, hereinafter, the "GLO Rules", for short, issued by the Government of Kerala invoking section 2 (1) of the Act. Thus, in its gist, the contention of the petitioners is that by the amending Act, the Government are obliged to follow section 24 of the Code as it stands amended and thereby make promotions to the category of Public Prosecutors and Additional Public Prosecutors from the category of Assistant Public Prosecutors.

4. A counter affidavit is placed on record contesting the stand of the writ petitioners.

5. The issue in hand, essentially, revolves on the interpretation of section 24 of the Code as it stands after the amendment in 2005. Sub-section (3) of section 24 provides that the State Government shall appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors for every district. It also contains a provision, whereby, the Government

may appoint a Public Prosecutor or Additional Public Prosecutor appointed for one district to be the Public Prosecutor or Additional Public Prosecutor for another district also. Sub-section (4) of section 24 provides that the District Magistrate shall, in consultation with the Sessions Judge, prepare a panel of names of persons, who are, in his opinion, fit to be appointed as Public Prosecutor or Additional Public Prosecutors for the district. This provision, vis-a-vis the GLO Rules fell for specific consideration of this Court in **Omanakkuttan** v. **State of Kerala** [2003 (1) KLT 226]. Sub-section (5) of Section 24 provides that no person shall be appointed as a Public Prosecutor or Additional Public Prosecutor unless his name appears in the panel of names prepared by the District Magistrate under sub-section (4). The inclusion in the panel prepared by the District Magistrate in terms of sub-section (4), i.e., in consultation with the District Judge, is a condition precedent for a person being appointed as a Public Prosecutor or Additional Public Prosecutor for a district in terms of that provision. Sub-section (6) provides that notwithstanding

anything contained in sub section (5), that is to say, notwithstanding the mandate of sub-section (5) that only a person whose name appears in the panel of names prepared under sub-section (4) shall be appointed, where, in a State, there exists a regular cadre of Prosecuting Officers, the State Government shall appoint a Public Prosecutor or an Additional Public Prosecutor only from among the persons constituting such cadre. This is subject to a proviso that where no suitable hands are available for such appointment in terms of sub-section (6), appointment shall be made from the panel prepared in terms of sub-section (4). Therefore, in States where there exists a regular cadre of Prosecuting Officers, appointment has to be made only from that cadre unless suitable persons are unavailable.

6. The phrase 'regular Cadre of Prosecuting Officers' has been statutorily explained, specifically, in Explanation (a) incorporated after that sub-section, for the purpose of sub section (6), to

mean a cadre of Prosecuting Officers, which includes therein the post of a Public Prosecutor, by whatever name called, and which provides for promotion of Assistant Public Prosecutors by whatever name called, to that post. This means that there has to be a regular cadre of Prosecuting Officers. That cadre should include the posts of Public Prosecutor and Assistant Public Prosecutor. That cadre should also provide for promotion of Assistant Public Prosecutors to the cadre of Public Prosecutor. The term 'Public Prosecutor and Additional Public Prosecutor' may be differently named in different States. But, there has to be a cadre of Prosecuting Officers and that cadre should have at least two tiers of posts, one which is lower than the other. Then, the lower will be treated as Assistant Public Prosecutor and the higher as Public Prosecutor. Not only that, the provision which creates that cadre should also provide for promotion from the lower category to the higher category. Then and only then would sub-section (6) of section 24 of the Code come into play.

7. Sub-section (6) will show that the special provision will apply only to States where there exists a regular cadre of Prosecuting Officers. The existence of a regular cadre of Prosecuting Officers would depend upon the creation of such a cadre by the State Government. That could be done either in exercise of authority under the Public Services Act or otherwise. In so far as the State of Kerala is concerned, the Special Rules noticed above does not contain the creation of any cadre of Prosecuting Officers. In fact, there is also no case for the petitioners that there is such a cadre, going by the Special Rules. The contention that a cadre has been created by the amendment to the Code is wholly misconceived. It does not create or provide for the creation of a cadre. Nor does it mandate the creation of a cadre. All that happens is it takes care of the interest of the officers in a State where there may be a regular cadre of Prosecuting Officers. There is no obligation in section 24 on any State Government, to create a regular cadre of Prosecuting Officers. If it were the intention of sub section (6) to exclude other methods of recruitment in States where there is no

regular cadre of Prosecuting Officers, and if it were the mandate of section 24 of the Code that a regular cadre of Prosecuting Officers shall be created by the State Government, the continuance of sub-sections (4) and (5) would become meaningless unless to meet an emergency where all persons in the regular cadre would be unsuitable to be appointed as a Public Prosecutor. There is, therefore, no rhyme or reason to uphold the contentions of the petitioners and to hold that the appointment to the post of Public Prosecutor and Additional Public Prosecutor in the State of Kerala has to be from among the Assistant Public Prosecutors governed by the Special Rules.

In the result, these writ petitions fail. They are accordingly dismissed.

Sd/-

THOTTATHIL B.RADHAKRISHNAN,
Judge

kkb.